In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-623

KENTUCKY CARBON CORPORATION AND BITUMINOUS COAL OPERATORS' ASSOCIATION, PETITIONERS

v.

INTERIOR BOARD OF MINE OPERATIONS APPEALS AND FRANKLIN PHILLIPS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Respondent Franklin Phillips, a coal miner, was discharged by petitioner Kentucky Carbon Corporation after his failure to comply with an order to return to work, despite his belief that the working conditions were dangerous. For several months prior to his discharge, Phillips had complained about safety conditions to his foreman and to the Mine Safety Committee. The Committee, which is provided for in the collective bargaining agreement, consists of elected representatives of the miners who are authorized to investigate safety and health conditions and who may close an area of a

mine if imminent danger to the men is threatened. If the mine management refused to correct a hazard, the Committee could report the condition to a Safety Coordinator appointed by the Union who, if necessary, could call a Federal Inspector from the Bureau of Mines and request an inspection (Pet. App. 5a-6a, 39a).

After his discharge, Phillips filed a grievance under the National Bituminous Wage Agreement of 1968, alleging that he had been unjustly discharged. The Board of Arbitration umpire denied the grievance. Phillips then filed a complaint against the mine with the National Labor Relations Board, which was also denied (Pet. App. 8a-10a, 40a).

Phillips then applied to the Secretary of Interior pursuant to Section 110(b)(2) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 820(b)(2), for review of his discharge, alleging that he had been discriminatorily discharged for having complained of unsafe working and health conditions in the mine. The Administrative Law Judge held that Phillips had been discharged in violation of the Act (Pet. App. 11a, 41a-42a). On appeal by the mine, the Interior Board of Mine Operations Appeals (respondent herein) reversed (Pet. App. 37a-47a), finding no support in the record for finding or inferring that Phillips either reported or intended to initiate a reporting process to the Secretary or his authorized representative, or that management's motivation in discharging him was retaliation for such reporting or initiation of the reporting process. The Board ruled that Phillips' complaints to fellow employees, supervisors, or the management of the mine were not sufficient to bring him within the protection of the Section (Pet. App. 43a-44a).

On Phillips' petition for review, the Court of Appeals for the District of Columbia Circuit (in a 2-to-1 decision) reversed the Board and reinstated the order of the Administrative Law Judge (Pet. App. 1a-35a). The court of appeals rejected the Board's narrow construction of the Act, holding that a "liberal construction of the language of the Act is justified" in view of the "wide scope of protection intended" by Congress (Pet. App. 21a). And "given the mine's procedures regarding safety complaints,"[1] the court ruled that "the coverage of the Act begins when the miner notifies his foreman and/or safety committeeman of possible safety violations" and, accordingly, that Phillips' discharge violated the Act (Pet. App. 13a).

Although the government was unsuccessful in the court of appeals, we decided not to file a petition for a writ of certiorari. While we believe that the Board's finding that Phillips was not discharged for filing complaints concerning safety conditions was supported by substan-

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[1]The court described the mine's procedure as follows (Pet. App. 16a-17a):

(1) miner notifies his foreman of the problem and tries to obtain corrective action;

(2) if the foreman disagrees, the miner has the right to call in the Mine Safety Committeeman to evaluate the complaint;

(3)(a) if the Mine Safety Committeeman agrees with the miner and the foreman fails to correct the problem, the Committeeman can bring the case to the entire Committee and they may order the mine section closed;

(3)(b) if the Mine Safety Committeeman disagrees with the miner, the latter can request a Federal Mine Inspector be called in. Pending that determination, the miner is to be temporarily reassigned to another area.

tial evidence, we do not consider that issue appropriate for review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

The court of appeals' construction of Section 110 of the Federal Coal Mine Health and Safety Act presents an issue of importance in the administration of the Act, but at the present time there is no conflict in the circuits. Indeed, so far as we are aware, the issue has arisen only in the District of Columbia Circuit. See *Munsey, et al.* v. *Morton, et al.* (No. 72-2995, decided December 17, 1974, C.A. D.C.). We suggest, therefore, that consideration of this issue by this Court should await further litigation in the courts of appeals.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.